an abuse must be distinguished from criticism and that any judgment could be criticized as contrary to law and that criticism was not contempt. He also stated that if a person was performing a public duty he was protected and that speeches here were made bona fide. He submitted that the court should have the magnanimity to excuse intemperate language. He also pointed out that both speakers were using a language with which they not comfortable with.

We have read and considered the speeches of both the first and second respondents and having regard to those speeches as a whole we cannot say that they have not exceeded the bounds of reasonable courtesy or were made in good faith. As advocates and solicitors they are both officers of the court and are expected to uphold the dignity of the court and the respect for the judges. But they have ridiculed the Supreme Court. We find that the first and second respondents had gone outside the two limits of reasonable courtesy and good faith. The blatant insinuations made by them had scandalized the Supreme Court and brought it into disrepute as they were not within limits of reasonable courtesy and good faith. We find that the applicants have proven their case against them beyond reasonable doubt and we find both of them guilty of contempt of this court.

Finally we must say that the court should seriously consider custodial sentence in such cases and hereby warn that in future custodial sentence might be imposed. However, in the circumstances of this case, we would follow the decision of this court in *A-G & Ors* v *Arthur Lee Meng Kuang*[2] and impose a fine of $5,000 or in default three months' imprisonment on the first and second respondents. We also order that the first and second respondents should pay the costs of this application to the applicants.

As regards costs, we hereby order that in respect of the first application costs should follow the event. And in respect of the second application, costs for the third respondent should follow the event.

Order accordingly.

Solicitors: *Shearn Delamore & Co; Meena Rajes & Partners; LC Loh & Co; Ong & Manecksha.*

Reported by *Prof Ahmad Ibrahim*

Government of Malaysia v VR Menon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 172 OF 1987
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA), LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND MOHAMED YUSOFF SCJJ
27 DECEMBER 1989

Constitutional Law — Pensions — Right to equality — Protection of pension rights — Pensions Adjustment Act 1980, s 1(2) — Federal Constitution, arts 4(1), 8(1) & 147

Public Servants — Pensions — Right to additional benefits — Provision giving additional benefits to pensioners resident in Malaysia only — Pensions Adjustment Act 1980, s 1(2) — Federal Constitution, arts 4(1), 8(1) & 147.

The Pensions Adjustment Act 1980 ('the Act') made provisions for additional benefits to pensioners and their dependants. Foreign resident pensioners were however excluded by s 1(2) of the Act which provides that the Act shall apply throughout Malaysia in respect of retired officers and their dependants 'who are resident in Malaysia'. The respondent is an Indian citizen residing in Madras, India. He is a pensioner receiving pension from the Malaysian government and he is aggrieved by the residential qualification imposed by s 1(2) which excludes him and his dependants from the additional benefits conferred by the Act. He brought an action against the government of Malaysia seeking a declaration that he be paid his pension in accordance with the Act as any other resident pensioners in Malaysia and for other consequential reliefs. The learned trial judge gave judgment for the respondent (see [1987] 2 MLJ 642) as he held that the provision in s 1(2) of the Act which restricts the application of the Act to residents in Malaysia is void and of no effect. The appellant appealed.

Held, allowing the appeal:

(1) There can be no doubt that s 1(2) of the Pensions Adjustment Act 1980 is discriminatory against foreign-resident pensioners but the classification between foreign and local resident-pensioners is founded on an intelligible differentia and has a rational nexus with the object to be achieved by the 1980 Act which is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the ringgit and the rise in the cost of living in Malaysia.

(2) The residential qualification imposed by the Act constitutes a permissible discrimination and therefore does not violate the equality provision of art 8(1) and as such it is not null and void under art 4(1) of the Federal Constitution.

(3) The provision of art 147(1) of the Federal Constitution guarantees the additional pension benefits to the respondent only if the 1980 Act is applicable to him. Since it is not applicable to him, that would be an end of the matter.

[Akta Penyelarasan Pencen 1980 telah membuat peruntukan memberi faedah tambahan kepada pesara dan tanggungan mereka. Akan tetapi pesara yang duduk di luar negeri telah disingkir oleh s 1(2) Akta itu yang memperuntukkan bahawa Akta itu hendaklah dipakai diseluruh Malaysia bagi pegawai yang telah bersara dan tanggungan mereka 'yang bermastautin di Malaysia'. Responden di dalam kes ini ialah warganegara India yang bermastautin di Madras, India. Ia adalah pesara yang menerima pencen dari kerajaan Malaysia dan ia tersinggung oleh syarat kemastautinan yang dikenakan oleh s 1(2) yang menyingkirkan-

nya dan tanggungannya dari faedah tambahan yang diberi di-
A bawah undang-undang pencen 1980 itu. Ia telah membawa tuntutan terhadap kerajaan Malaysia meminta perisytiharan bahawa ia layak diberi pencennya mengikut Akta 1980 itu seperti pesara-pesara yang bermastautin di Malaysia dan ia menuntut relif bersangkutan. Hakim yang arif telah memberi penghakiman bagi pihak responden oleh kerana beliau berpendapat peruntukan di dalam s 1(2) Akta Penyelarasan Pencen
B 1980 itu yang menyekat penggunaan Akta itu kepada pemastautin di Malaysia adalah tidak sah. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Tidak syak lagi s 1(2) Akta Penyelarasan Pencen 1980 membeza-bezakan pesara yang bermastautin di luar negeri akan
C tetapi pengasingan antara pesara di luar negeri dan pesara yang bermastautin di dalam negeri adalah berasas kepada perbezaan yang mudah difahami dan mempunyai perhubungan yang rasional dengan tujuan yang hendak dicapai oleh Akta 1980 itu, iaitu membaiki kedudukan kewangan pesara-pesara di Malaysia akibat dari kejatuhan nilai ringgit dan kenaikan belanja hidup di Malaysia.

(2) Syarat kemastautinan yang dikenakan oleh Akta adalah
D diskriminasi yang dibenarkan dan oleh kerana itu tidak melanggar peruntukan sama rata dibawah perkara 8(1) dan dengan demikian bukan tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan.

(3) Peruntukan Perkara 147(1) Perlembagaan Persekutuan menjamin faedah tambahan pencen itu untuk responden
E hanya jika Akta 1980 dapat dipergunakan olehnya. Oleh kerana Akta itu tidak dapat dipergunakan olehnya, perkara itu tidak timbul.]

Cases referred to

1 *Malaysian Bar & Anor* v *Government of Malaysia* [1987] 2 MLJ 165 (folld)
F 2 *Datuk Haji Harun bin Hj Idris* v *PP* [1977] 2 MLJ 155 (refd)

Legislation referred to

Pensions Adjustment Act 1980 s 1(2)
Federal Constitution arts 4(1), 8(1), 147

Appeal from: Civil Suit No P 172 of 1984 (High Court, Kuala
G Lumpur)

KN Segara (Senior Federal Counsel) (*Hassan bin Lah* (Senior Federal Counsel) with him) for the appellant.
GT Rajan for the respondent.

Cur Adv Vult

H **Mohamed Azmi SCJ** (delivering the judgment of the court): The Pensions Adjustment Act 1980 ('the Act') which came into force on 1 July 1980 makes provisions for additional benefits to pensioners and their dependants. Foreign resident pensioners are however excluded by s 1(2) of the Act which provides that the Act shall apply
I throughout Malaysia in respect of retired officers and their dependants 'who are resident in Malaysia'.

Mr VR Menon, the respondent in this appeal, is an Indian citizen residing in Madras since March 1973. He is aggrieved by the residential qualification imposed by s 1(2) which excludes him and his dependants from the additional benefits conferred by the Act. He was in the service of the Electrical Department, the predecessor of the present National Electricity Board, from 16 June 1941 until he retired on 1 February 1973. It is not in dispute and the learned judge so found that:

> He has received increases in his pension along the way as and when pensions were revised by the government but when the 1980 Act was passed giving more benefits to pensioners and to their dependants, the plaintiff found himself precluded from receiving these additional benefits because the application of the Act was restricted to pensioners and their dependants who are residing in Malaysia.

When the respondent retired on 1 February 1973, based on his last drawn salary of $1,500 per month, he was given a pension of $703.13 under the then pension legislation. The pension was subsequently revised to a sum of $1,062.50 when his salary was revised with effect from 1 July 1973 under the Harun Commission Report from $1,500 to $2,125. If the Act had been applied, he would have been paid an additional pension of $322.50, thereby increasing his pension from $1,062.50 to $1,385 per month.

By letter dated 22 July 1980, he wrote to the then Malaysian High Commissioner in India, entitled 'New Pension Scheme announced by Malaysian Government — discrimination against non-residents', wherein he appealed to the High Commissioner 'to impress on Your Excellency's government the need to extend the new pension scheme to me and other Malaysian government pensioners residing in India'. A copy of the letter was extended to the Minister of External Affairs, Government of India, and as expected the Malaysian High Commissioner referred the letter to the Pension Department in Kuala Lumpur. On 25 August 1980, the Director of the Pensions Division of the Public Services Department rejected the respondent's claim for the increased pension given under the Act for reason that the respondent is a non-Malaysian resident. We shall in a moment refer to the relevant parts of this important letter. Accordingly, the respondent brought the present action against the government of Malaysia seeking a declaration that he be paid his pension in accordance with the Act as any other resident pensioners in Malaysia and for other consequential reliefs.

In the court below, the case for the respondent was argued on two constitutional grounds. First, it was submitted that the provision of s 1(2) of the 1980 Act limiting the application of its provisions to only pensioners 'who are resident in Malaysia' was in violation of the equality provision of art 8(1) of the Federal Constitution. Secondly, it was contended that art 147 of the Constitution protected the pension rights of the respondent under the later law, ie the Act as it was more favourable to him. The learned trial judge found for the respondent on both issues. [See [1987] 2 MLJ 642.] At p 10 of his judgment, [p 646 of the report], he held:

> The law applicable to the pension of the plaintiff in this case is this later law — the Pensions Adjustment Act 1980. Any attempt to deprive him of the benefits of this later law will amount to an arbitrary and unfair discrimination inconsistent with art 8(1) and art 147 of the Federal Constitution.

The learned judge continued at p 11:

> In the circumstances, therefore, I find that the classification of resident and non-resident pensioners is not based on an intelligible differentia and that the differentia is wholly unrelated to the object of the Pensions Adjustment Act 1980. The classification offends art 8(1) of the Federal Constitution and has to be declared void. I accordingly declare that the provision in s 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to residents in Malaysia is void and of no effect. The plaintiff's claim is allowed with costs. His pension is to be adjusted in accordance with the provisions of the Pensions Adjustment Act 1980 and arrears together with 8% interest pa to be calculated on a yearly basis paid to him.

On the first issue, is the exclusion of non-resident pensioners from the Act unconstitutional for being inconsistent with the provision of art 8(1)? That article states:

> All persons are equal before the law and entitled to the equal protection of the law.

The learned trial judge referred to the majority judgment of this court in *Malaysia Bar & Anor* v *Government of Malaysia*[1] and the decision of the Federal Court in *Datuk Haji Harun bin Hj Idris* v *PP*[2] which set out the correct approach in determining permissible legislative classification in relation to the equality provision of art 8(1).

The first question to be asked is, is the Act discriminatory in view of the residential qualification imposed by the words 'who are resident in Malaysia' in s 1(2) of the Act? Mr Segara, senior federal counsel, makes a weak attempt to contend otherwise, and he has no answer to the concession already made by Mr PM Mahalingam, the then counsel for the appellant in the court below, that the restrictive provision of s 1(2) is indeed discriminatory. In our view, there can be no doubt that the Act is discriminatory against foreign-resident pensioners.

Since the Act is discriminatory, and because the prohibition of unequal treatment in the Constitution is not absolute, the next question to be asked is, is the discrimination permissible? As stated in the *Malaysian Bar* case:[1]

> Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification provided that -
>
> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different basis such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

We find no difficulty in holding that the classification between foreign and local resident-pensioners is founded on an intelligible differentia. The only question is whether the differentia has a rational relation to the object sought to be obtained by the Pensions Adjustment Act 1980. For this purpose, we have to consider the reply dated 25 August 1980 addressed to the respondent by the Director-General of the Public Services Department, which was quoted in full by the learned trial judge at pp 7 and 8 of his judgment. For our purpose, we need only refer to paras 2 and 3 of the said letter which state:

> 2 As inflation in the country has reduced the real value of pensions, the Malaysian government has from time to time supplemented the pensions by according increases in the form of allowances to its employees who had retired with pensions based on wages prevailing at the time of their retirement. The government was not committed to pay such increases to pensioners resident outside Malaysia whose pensions were also affected by changes in the cost of living in the countries in which they were residing but nevertheless, it had in the past extended these increases as a matter of concession.
>
> 3 When the wages for employees in the public sector were revised effective from 1 July 1980, the government decided that employees who had retired before the revision should receive pensions recomputed on the revised wages that they would have drawn, had they been deemed to be in service when the revision took effect. Widows of pensioners and employees also became eligible to receive pensions for life on condition that they do not remarry. These were new principles and the government, as a matter of policy, decided that it should not extend these principles to pensioners who reside outside Malaysia. It would also be unreasonable for local taxpayers to bear the additional cost of such payments.

The object of the Act is not to give additional benefits, pure and simple, to pensioners. The object is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the ringgit, and the rise in cost of living allowance in Malaysia. Although it may be reasonable to assume that inflation is a common factor everywhere, it would be arbitrary to conclude not only that the rate of depreciation in value of the Malaysian ringgit is the same as all foreign currencies, but also that the rate of inflation is the same everywhere. We therefore disagree with the learned trial judge that the classification has no rational nexus with the object sought to be achieved by the 1980 Act. In our view, the residential qualification imposed by the Act constitutes a permissible discrimination, and therefore does not violate the equality provision of art 8(1) and as such, it is not null and void under art 4(1) of the Federal Constitution.

In this appeal we take into serious consideration that the Act is not a law concerned with fundamental rights. It is a legislation in the area of economic or social welfare to confer extra benefits to pensioners resident in Malaysia. As such, the learned judge erred in principle when he appeared to have applied a stricter standard of review. As

indicated by us in the *Malaysian Bar* case,[1] to attain constitutional validity in this type of legislation, it is sufficient if the classification made by the statute has a governmental purpose. In this particular case, we are of the opinion that the appellant has satisfied us that the classification in the Act has a reasonable governmental purpose, and consequently, the restriction imposed must be held to be constitutionally valid.

On the second issue, we do not comprehend the argument on art 147(1) which provides:

> The law applicable to any pension, gratuity or other like allowance (in this Article referred to as an 'award') granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.

The provision of art 147(1) guarantees the additional pension benefits to the respondent only if the Act is applicable to him. Since it is not applicable to him, that would be the end of the matter.

For the reasons given, we allow the appeal with costs and set aside the order of the learned trial judge.

Appeal allowed.

Solicitors: *GT Rajan & Co.*

Reported by *Prof Ahmad Ibrahim*

United Malayan Banking Corp Bhd v Tan Lian Keng & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22(23)-287-87
EDGAR JOSEPH JR J
8 NOVEMBER 1989

Evidence — Extrinsic evidence adduced — Whether admissible — Evidence of negotiations as 'matrix of fact' — Evidence Act 1950, ss 91 & 92

Civil Procedure — Summary judgment — Triable issues — Rules of the High Court 1980, O 14

This was an application for summary judgment under O 14 of the Rules of the High Court 1980 arising out of an action by the plaintiffs, a bank, against the defendants seeking enforcement of a contract of guarantee and indemnity dated 24 August 1982. In pursuance of the said guarantee and indemnity the plaintiffs had granted banking facilities to Butterworth Marketing Consultant Sdn Bhd ('the company') which amounted to $1,221,505.20 at the date of commencement of the action. In the event, the company was wound up and the plaintiffs commenced the action herein.

The defendants contended that notwithstanding the terms and conditions of the guarantee and indemnity arising from representations made by the plaintiffs' manager to the defendants, there had been 'an understanding' that the plaintiffs would only proceed against the defendants for any sums due and owing by the company to the plaintiffs after the plaintiffs had taken action against the company by enforcing a charge executed as security for the banking facilities.

Held, allowing the plaintiffs' application:

(1) The Evidence Act 1950, by s 91, excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance with or in contradiction of or in addition to or in substraction of the terms of a document.

(2) Even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construe the agreement.

(3) The effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss 91 and 92.

(4) Even if such extrinsic evidence is admissible, there is nothing to suggest that the manager concerned possessed actual or ostensible authority to make the representations alleged on behalf of the plaintiffs so that even if such representations had been made it would not have been binding upon the plaintiffs.

Cases referred to

1 *Mok Hin Wah & Ors* v *UMBC* [1987] 2 MLJ 610 (refd)
2 *Lesco Development Corp Sdn Bhd* v *Malaysia Building Society Bhd* [1988] 2 MLJ 184 (refd)
3 *John Pym* v *Robert Campbell & Ors* (1856) 119 ER 903 (refd)
4 *Tyagaraja Mudaliyar & Anor* v *Vedathanni* AIR 1936 PC 70 (refd)
5 *Secured Income Real Estate (Australia) Ltd* v *St Martins Investments Pty Ltd* (1979) 144 CLR 596 (refd)